Duane A. Admire, State Bar No. 173699
ADMIRE & ASSOCIATES
12880 Carmel Country Road, Suite D110
San Diego, CA 92130
Telephone: (619) 316-6658
Facsimile: (858) 350-1046

James R. Patterson, State Bar No. 211102
Allison H. Goddard, State Bar No. 211098
Jacquelyn E. Quinn, State Bar No. 314616
PATTERSON LAW GROUP APC
1350 Columbia Street, Suite 603
San Diego, CA 92101
Telephone: (619) 756-6990
Facsimile: (619) 756-6991

Attorneys for Plaintiff CARLA JONES

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO – CENTRAL DIVISION

CARLA JONES, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

SHARP HEALTHCARE, a California Corporation, SHARP GROSSMONT HOSPITAL, and DOES 1- 100, inclusive,

Defendants.

Case No. 37-2017-00001377-CU-NP-CTL

[E-FILE]

CLASS ACTION

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Date: March 9, 2018
Time: 8:30 am
Dept: 74
Judge: Hon. Ronald L. Styn

Action Filed: January 12, 2017
Trial Date: None Set

TABLE OF CONTENTS

I. INTRODUCTION 1

II. SHARP'S OPPOSITION IS RIDDLED WITH INCORRECT AND UNSUPPORTED FACTUAL ASSERTIONS 1

III. PLAINTIFF HAS MET THE REQUIREMENTS FOR CLASS CERTIFICATION 2

A. The Class is Ascertainable 2

1. Plaintiff's Causes of Action Do Not Require Proof of Recording 3

2. Sharp Only Offers Speculation That Some of the Class Members Were Not Recorded 4

3. To the Extent Necessary, the Videos Can Be Examined Efficiently For Identification and Categorization of Class Members 4

B. The Class Has a Well-Defined Community of Interest 6

1. Individual Issues Do Not Predominate 6

C. Class Treatment Is Superior 13

IV. CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Aguirre v. Amscan Holdings, Inc.
(2015) 234 Cal.App.4th 1290 3

Atl. Nat. ins. Co v. Armstrong
(1966) 65 Cal.2d 100 9

Bartold v. Glendale Fed. Bank
(2000) 81 Cal.App.4th 816 3

Bell v. Farmers Ins. Exchange
(2004) 115 Cal.App.4th 715 10

Bennett v. Regents of Univ. of Cal.
(2005) 133 Cal.App.4th 347 11

Beynon v. Garden Grove Med. Grp.
(1980) 100 Cal.App.3d 698 9

Brinker Restaurant Corp. v. Superior Court
(2012) 53 Cal. 4th 1004 10

Brown v. Regents of Univ. of Cal.
(1984) 151 Cal.App.3d 982 11

Bufil v. Dollar Financial Group, Inc.
(2008) 162 Cal.App.4th 1193 3

Capelouto v. Kaiser Foundation Hospital
(1972) 7 Cal. 3d 889 12

City of San Jose v. Superior Court
(1974) 12 Cal.3d 447 7

D.C. v County of San Diego
(S.D. Cal. Nov. 7, 2017) No. 15cv1868, 2017 U.S.Dist.LEXIS 185548 12

Daar v. Yellow Cab Co.
(1967) 67 Cal.2d 695 3

Hale v. Sharp Healthcare
(2014) 232 Cal.App.4th 50 6

Hernandez v. Hillsides, Inc.
(2009) 47 Cal.4th 272 .....3, 4, 7

La Sala v. American Sav. & Loan Assn.
(1971) 5 Cal.3d 864 8

Newell v. State Farm Gen. Ins. Co.
(2004) 118 Cal.App.4th 1094 13

Nicodemus v. Saint Francis Memorial Hosp.
(2016) 3 Cal.App.5th 1200 .....3, 13, 14

Rose v. Medtronics, Inc.
(1980) 107 Cal.App.3d 150 11

Sargon Enters., Inc. v. Univ. of S. Cal.
(2012) 55 Cal.4th 747 12

Sav-On Drug Stores, Inc. v. Superior Court
(2004) 34 Cal.4th 319 .....10, 11, 12, 13

Trujillo v. City of Ontario
(C.D.Cal. Apr. 14, 2005) No. EDCV 04-1015, 2005 U.S.Dist.Lexis, 2005 U.S.LEXIS 50353.....6, 8

Wilson v. San Francisco Fed. Sav. & Loan Assn.
(1976) 62 Cal.App.3d 1 8

Statutes

Code of Civil Procedure § 382.....15

Other Authorities

CACI 1820 10

I. INTRODUCTION

Sharp's opposition to Plaintiff's motion is based on incorrect interpretations of the law, and speculation as to the facts. Neither is sufficient to defeat certification.

The proposed class is easily ascertainable from Sharp's records. It is well-defined using objective critera. It is not overbroad, and if necessary, the recordings at issue could be efficiently reviewed to identify class members.

Sharp's liability will turn entirely on Sharp's wrongful conduct. Sharp invaded class members' privacy by installing and operating hidden cameras, recording some of the most private moments in class members' lives, without their consent. The facts driving a liability determination are founded in Sharp's conduct, and they are common to all class members.

Any individual issues concerning damages cannot defeat certification, because they do not present insurmountable or unmanageable issues. Sharp relies on inapt cases that question the viability of certification of claims for emotional distress damages, but Sharp does not explain how or why those cases would govern here. Each class member suffered the same injury, even if in potentially different degrees. The potential that class members' damages differ in degree, however, should not defeat certification. This Court has the expertise to manage those issues efficiently and in the interest of justice. The alternative – that Sharp will suffer no consequences for its conduct, and class members will remain uninformed of their rights – cannot be squared with California's strong public policy favoring class actions.

Plaintiff respectfully requests that the Motion be granted.

II. SHARP'S OPPOSITION IS RIDDLED WITH INCORRECT AND UNSUPPORTED FACTUAL ASSERTIONS

Sharp claims that it began an investigation into Propofol in 2012, and that the investigation continued for months before Sharp could definitively determine how the Propofol was going missing. The evidence Sharp supports for this is the Declaration of Howard Labore at paragraphs 2 and 3. But Mr. Labore has no personal knowledge of either of these facts. These paragraphs of Mr. Labore's declaration are alleged based on "information and belief." They are also contradicted by evidence submitted by Plaintiff in support of her motion. Sharp's decision to install hidden cameras in its operating

rooms had nothing to do with Propofol. Sharp's employees testified in deposition that Propofol was not discussed or a concern until Sharp's "investigation" of missing drugs had almost concluded. (Goddard Decl. Ex. 8, at 45:16-21; Ex. 9, at 59:19-60:15.) In the first four months after Sharp installed the hidden cameras, only four single-dose vials of Propofol went missing. (*Id.* Ex. 12, at 1.)

Sharp also claims that the cameras were installed in computer monitors on top of the drug carts in operating rooms, and claims that because the drug carts were mobile, the angle of the camera could be repositioned and changed whenever the drug cart was moved. (Hamel Decl. ¶¶ 2-6.) But Sharp's employees testified at deposition that the monitors with cameras were connected to the anesthesia cart, not a mobile drug cart. (Chow Decl. Ex. A, at 83:15-84:2.) Sharp's suggestion that the angle of the cameras would change with the position of the drug carts is simply wrong.

Sharp claims that it deleted all videos taken prior to February 2013, because "storing them all on Sharp's system would likely cause Sharp's system to crash or at least increase the chances of a crash." (Opp'n, at 3.) The evidence Sharp cites to support this claim is an excerpt from Mr. Labore's deposition and a paragraph from his declaration. Mr. Labore did not have a role in the investigation, however, until February 2013, so it is not clear he has personal knowledge that any recordings were deleted. (Chow Decl. Ex. A, at 111:2-14.) The Sharp employee who was responsible for handling IT issues related to the secret recordings testified at deposition that he cannot remember deleting any recordings. (Goddard Decl. Ex. 26, at 66:12-19, 94:23-96:5.) As to Sharp's claim that it deleted recordings because of concerns they would crash Sharp's system, Sharp stored the recordings that it does not claim were deleted on a portable hard drive, and offers no explanation why the purportedly deleted recordings were not stored in a similar manner. (*E.g.*, Goddard Decl. Ex. 6, at 112:17-113:6.)

III. PLAINTIFF HAS MET THE REQUIREMENTS FOR CLASS CERTIFICATION

A. The Class is Ascertainable

Sharp argues the class is not ascertainable because it is overbroad. This argument should be rejected because it is based on a misunderstanding of the ascertainability standard, and pure speculation.

A class is ascertainable "if it identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself or herself as having a right to recover based on the description." (*Aguirre v. Amscan Holdings, Inc.* (2015) 234

Cal.App.4th 1290, 1299-1300 [quoting *Bartold v. Glendale Fed. Bank* (2000) 81 Cal.App.4th 816, 828].) A named plaintiff does not have to "identify, much less locate, individual class members to establish the existence of an ascertainable class. … Nor must the representative plaintiff establish a means for providing personal notice of the action to individual class members." (*Id.* at 1301.) Even if "class members are unidentifiable" at the class certification stage, this would "not preclude a complete determination of the issues affecting the class." (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 706.)

A defendant cannot defeat certification by vague and speculative claims of overbreadth. (*See Nicodemus v. Saint Francis Memorial Hosp.* (2016) 3 Cal.App.5th 1200, 1216 [defendant's speculation that some potential class members may not have a claim was an inappropriate focus of ascertainability inquiry]; *see also Bufil v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, 1207 [defendant's speculation that an employee who missed a meal break nonetheless might have received a rest break goes to the merits of ultimate recovery and was an inappropriate focus for the ascertainability inquiry].) To the extent the class includes any persons who are not entitled to recover from Sharp, they can be easily identified at the appropriate time in the litigation.

1. Plaintiff's Causes of Action Do Not Require Proof of Recording

Sharp incorrectly assumes that an invasion of privacy claim based on a hidden camera can only be valid if a plaintiff was actually recorded by the camera. In making this assumption, Sharp ignores the Supreme Court's opinion in *Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, even though Plaintiff cited it in her motion.

In *Hernandez,* the plaintiffs sued their employer after learning that a hidden camera had been placed in their office in an effort to identify an employee who had been accessing pornography on work computers. (*Id.* at p. 277.) The Supreme Court held that the fact that the plaintiffs had not been recorded by the cameras did not defeat their claims for invasion of privacy:

> As emphasized by defendants, the evidence shows that Hitchcock never viewed or recorded plaintiffs inside their office by means of the equipment he installed both there and in the storage room. He also did not intend or attempt to do so, and took steps to avoid capturing them on camera and videotape. While such factors bear on the offensiveness of the challenged conduct, … we reject the defense suggestion that they preclude us from finding the requisite intrusion in the first place.

(*Id.* at 292.) The Supreme Court found instead that determining whether plaintiffs stated a claim required

consideration of "all the relevant circumstances," including the defendant's motive for recording and the defendant's attempts to minimize an invasion of privacy. (*Id.* at 300-01.) Whether a class member can recover if Sharp did not obtain a recording of her, despite the placement and operation of the hidden cameras, is a question for the jury. The jury's determination may narrow the scope of class members who may recover, but it would not preclude certification.

2. Sharp Only Offers Speculation That Some of the Class Members Were Not Recorded

Sharp's claim that some of the class members were not recorded is based solely on the speculative testimony of a current employee, Howard Labore. At the direction of Sharp's attorney, Mr. Labore viewed all of the recordings Sharp currently has in its possession to document "HIPAA issues," such as whether he could see a patient's face or body parts. Mr. Labore reported these findings to Sharp in a report, but Sharp has withheld the report from discovery. (Goddard Decl. Ex. 6, at 112:17-114:24.) Sharp cannot use its refusal to disclose this report as a sword and a shield. Mr. Labore's deposition testimony that there were "numerous" occasions when a doctor covered the camera, or that a single refresh (essentially, a replacement) of a computer in one of the rooms, does not provide any concrete evidence that a significant number of class members were not recorded. And, as discussed above, an absence of recording does not automatically preclude a claim for invasion of privacy.

3. To the Extent Necessary, the Videos Can Be Examined Efficiently For Identification and Categorization of Class Members

Sharp argues that there is "no administratively feasible method of determining which of the Class members were actually recorded." Sharp claims this is because it deleted recordings made prior to February 1, 2013, and reviewing the recordings made after February 1, 2013, would be too burdensome. Neither claim precludes certification.

Sharp should not be able to avoid liability for the secret recordings it made prior to February 2013, merely because it made a self-serving decision to delete them. The preponderance of the evidence standard applies here. A jury should determine whether it is more likely than not, given Sharp's procedures, that class members were recorded by Sharp prior to February 1, 2013. A jury should also hear Sharp's explanation for deleting the recordings, and determine whether its explanation that "our system would have crashed if we had not deleted them" is true. A jury is likely to find this explanation

highly suspect, particularly since Sharp actually maintains the recordings still in its possession on a portable hard drive, and not on its "system." (Goddard Decl. Ex. 6, at 112:17-113:6.)

It would also not be unduly burdensome to review the recordings, if and when necessary to do so. Sharp provides an estimate of 241 hours to review the recordings that it currently has in its possession, plus an additional 361 hours to have class members testify that they are in the recording. This estimate is not only inflated; it is also based on the incorrect assumption that individual class members will have to testify in the liability phase of trial.[1]

It took Mr. Labore approximately three weeks, working 40 hours per week, to review all of the recordings. (Goddard Decl. Ex. 6, at 115:2-25.) Sharp tries to characterize Mr. Labore's review as cursory and limited to identifying "where they contained patients." But Mr. Labore testified that he spent time looking for possible HIPAA issues in the recordings and kept a log of what he viewed. (*Id.* at 113:4-114:21.) The issues he was looking for included: "Can you see a patient's face. Can you see any body parts of the patient. If so, what were those body parts. How long they were exposed. That type of stuff I was looking for." (*Id.* at 114:1-6.) There is no reason to believe it would take any more time for a similar review of the recordings.

Class members do not need to identify their specific recording unless and until Sharp is found liable in phase one of a bifurcated trial. The evidence of Sharp's liability will not rely on the unique recording of any individual class member. Plaintiff's recording can be used as representative of the class. Evidence of the other elements of an invasion of privacy claim will be common to all class members, because these elements are based on objective standards and focused on Sharp's behavior. For example, Plaintiff could use expert testimony or survey evidence to show that a surgical patient would have a reasonable expectation of privacy in the operating room. And the highly offensive nature element will be focused on Sharp's conduct, which was common to all class members. The extent of a particular class member's exposure on a recording does not present a liability issue; at most, it goes to the extent of a class member's damages. (*Trujillo v. City of Ontario* (C.D.Cal. Apr. 14, 2005) No. EDCV 04-1015, 2005

[1] Even if this estimate were true, 600 hours is not an unreasonable or burdensome amount of time considering the rights at issue here. It is approximately 15 weeks of work time on a regular 40 hour per week schedule, and the recordings could easily be turned over to Plaintiff or a Special Master to accomplish this review so that no burden falls on Sharp.

U.S.Dist.Lexis, 2005 U.S.LEXIS 50353, at *8.)

After liability is determined, it may be necessary to associate recordings with specific class members. That will not be as burdensome as Sharp claims. The time spent by Sharp to locate Plaintiff's recording is not relevant, because Sharp was looking for one video. The process for 1,806 class members would be much more efficient. Exhibits 24 and 25 provide a list of all surgical procedures that took place in the three operating rooms, sorted by operating room, over the class period. Sharp also has surgical records that show this same information, plus the time the procedure began and ended. (Goddard Reply Decl. Ex. 29, at 31:3-8.) With a list of surgical procedures by date and time, it would be simple to match the recordings with a patient's medical record number by viewing the recordings in chronological order, especially since the recordings include date and time stamps. (*E.g.*, Ex. 23.) It is highly unlikely that class members would have to provide a picture, and individual testimony in court would not be required.

Hale v. Sharp Healthcare (2014) 232 Cal.App.4th 50, is nothing like this case. Sharp incorrectly states that in *Hale*, the court refused to certify a class because it was not "reasonably ascertainable." (Opp'n, at 10.) Actually, the appellate court in *Hale* affirmed decertification of a class based on ascertainability. (*Hale*, 232 Cal.App.4th at 53.) The trial court ordered decertification because class members could not be feasibly identified after ***three years*** of attempting to figure out which of ***120,000*** potential class members were unfairly charged for emergency services. (*Id.*) This case does not even come close to the serious issues of ascertainability in *Hale*.

The proposed class meets the acertainability requirement.

B. The Class Has a Well-Defined Community of Interest

Sharp argues that there is not a well-defined community of interest among the proposed class because common questions of law and fact do not predominate, and class treatment would not be beneficial. Neither argument has merit.

1. Individual Issues Do Not Predominate

Sharp's liability presents a question that is common to all class members. The common evidence of Sharp's liability includes: 1) Sharp's placement of hidden cameras in the operating rooms; 2) the motion-triggered recording of surgical procedures using those cameras for nearly a year; and 3) Sharp's motives for installing the hidden cameras. Sharp's liability to the class can be determined without

requiring the individual testimony of class members. The individual issues that Sharp raised in its Opposition do not predominate over these common questions.

The Severity of Invasion Relates Only to Damages, Not to Liability

Sharp claims that the "severity of the invasion" of privacy creates an individual issue because "each recording is inherently different." This claim misconstrues the standard for demonstrating invasion of privacy, and is not supported by proof of any material variations in the recordings.

Sharp's conduct of installing cameras in the operating rooms, and then operating them by motion-sensitive triggers, is all that needs to be proved for invasion of privacy and breach of fiduciary duty. What the recordings captured presents, at most, issues for the damages phase. As the Supreme Court has recognized:

> Courts have acknowledged the intrusive effect for tort purposes of hidden cameras and video recorders in settings that otherwise seem private. It has been said that the "unblinking lens" can be more penetrating than the naked eye with respect to "duration, proximity, focus, and vantage point." Such monitoring and recording denies the actor a key feature of privacy – the right to control the dissemination of his image and actions.

(*Hernandez*, 47 Cal.4th at 291.) Sharp does not get to avoid liability because, by luck of the camera angle, less sensitive information was captured in some recordings.

Here, unlike in the case for nuisance presented in *San Jose* and relied upon by Sharp, Sharp's liability is not predicated on any variables like how much of the patient's body was recorded, or how long the patient was seen on the video. (*See City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 462 [finding class certification inappropriate where ". . . *liability* is here predicated on variables like the degree of noise, vapor, and vibration, the problem is compounded by the factors of distance and direction affecting these variables." (emphasis added)].) Sharp's liability is predicated on the common question of whether an objectively reasonable person would find it "highly offensive" or "an egregious breach of social norms" to have hidden cameras placed in an operating room while they underwent surgical procedures without their consent. The answer to that question can be determined on a class-wide basis.

The *Trujillo* case is on all fours with this one, and Sharp cannot credibly distinguish it. The district court's opinion contains a full analysis of the common legal and factual issues involved in proving a claim for invasion of privacy with respect to installation of hidden cameras in an area where

there is a reasonable expectation of privacy. (*Trujillo*, 2005 U.S.Dist.Lexis, at *10-11.) The *Trujillo* court did not discuss "whether, depending on what each individual plaintiff was recorded doing, the recording would be 'highly offensive' or violative of 'social norms' to a reasonable person" (Opp'n, at p. 14) as Sharp incorrectly argues it should have, because the *Trujillo* court correctly recognized that:

> "[d]efendants' characterization of proposed class members claims as 'disparate and unique' because 'not all of the employees are present on the videotape in the same amount of time, or in the same stage of dress' merits little consideration. The extent to which any particular proposed class member is on the videotape and his degree of undress bear on damages [not commonality]."

(*Id.* at *8.) Like *Trujillo*, the individualized questions Sharp has raised regarding the extent of exposure of class members "relate to damages" and "do not prevent class certification." (*Id.* at *10-11.)

Moreover, Sharp presents no evidence to support its claim that "each recording is inherently different." Mr. Labore's declaration does not support this claim. Even considering Mr. Labore's testimony, the recordings could easily be grouped into categories for efficiency if necessary. For example, recordings that showed any area of a patient's skin that would normally be covered by clothing, such as an abdomen, could be analyzed differently from recordings that only showed the patient entering or exiting the operating room. The severity of the invasion is a question for damages, not liability.

The Enforceability of the Admission Agreement Is a Common Question

Sharp claims that class members consented to be secretly recorded during their surgical procedures through a boilerplate provision in its Admission Agreement, which is an adhesion contract. Parties' rights under contracts of adhesion are well-suited for determination in a class setting. Contrary to Sharp's arguments, the issue of consent in the Admission Agreement presents a common issue, and will not require an individual analysis of each class member's understanding or sophistication.

The Supreme Court of California has held "[c]ontroversies involving widely used contracts of adhesion present ideal cases for class adjudication; the contracts are uniform, the same principles of interpretation apply to each contract, and all members of the class will share a common interest in the interpretation of an agreement to which each is a party." (*La Sala v. American Sav. & Loan Assn.* (1971) 5 Cal.3d 864, 877; *see also Wilson v. San Francisco Fed. Sav. & Loan Assn.* (1976) 62 Cal.App.3d 1, 7.) Plaintiff will not need to elicit individual testimony from each class member. (*Id.*)

The cases cited by Sharp further demonstrate there is no need for individual testimony from each patient regarding their own subjective expectations. In *Atl. Nat. ins. Co v. Armstrong* (1966) 65 Cal.2d 100, a single plaintiff action involving an insurance policy, the court did not engage in an examination of the insured's subjective knowledge or experiences beyond determining that by signing the insurance policy associated with the rental car, it could not be doubted that his intent was to relieve himself of liability that might arise out of his operation of the automobile, and an interpretation to the contrary would not meet his reasonable expectation. (*Id.* at 112.) In *Beynon v. Garden Grove Med. Grp.* (1980) 100 Cal.App.3d 698, another single plaintiff action involving interpretation of an insurance policy, the court similarly looked to the objective reasonable expectations of one enrolling in the insurance plan to find that a provision that limits the obligations of the health plan and health care provider would defeat the insured's reasonable expectations. (*Id.* at 706.)

The evidence is overwhelming that no person would reasonably expect that the boilerplate provision in the Admission Agreement would constitute consent to be recorded during surgery. Sophia Henderson, the employee whom Sharp trained specifically on how to answer and address patients' questions regarding the Admission Agreement, had no expectation that this provision encompassed such a broad consent. (Goddard Decl. Ex. 7, 12:1-12; 13:1-8; 13:15-14:3; 16:11-17:21; 20:11-17.) Ms. Henderson testified that had she been asked whether the Admission Agreement authorized Sharp to secretly record her while she was in the operating room undergoing a procedure with her doctor she would have responded, ***no.*** (*Id*.)

Other provisions of the Admission Agreement demonstrate that a reasonable person would not read the General Consent provision to allow hidden cameras in an operating room. Paragraph 5 refers to a list of Patient Rights that are entirely inconsistent with the notion that Sharp could secretly videotape patients. (*Id.* Ex. 3.) "Sharp HealthCare Patients' Rights" policy states that patients have the right to: Full consideration of privacy concerning the medical care program. Case discussion, consultation, examination and treatment are confidential and should be conducted discreetly. You have the right to be advised as to the reason for the presence of any individual. (*Id.* Ex. 4, at 2.) Similarly, the Admission Agreement includes specific requests for consent that are inconsistent with the notion that the General Consent provision encompasses the broad scope advanced by Sharp. Paragraph 15 gives patients the

option to opt out of being listed in the hospital directory. (*Id.* Ex. 3.) Paragraph 17 gives patients the option to deny consent to photograph their newborns. (*Id.*) Given these provisions, a reasonable person reviewing the Agreement would expect that they would be specifically asked for consent before Sharp videotaped their surgical procedure.

Whether an objectively reasonable person would expect Sharp's Admission Agreement to provide it with patient consent to allow hidden cameras in the operating room during medical procedures is a common question amenable to class-wide determination.

Any Individual Issues Relating to Damages Do Not Defeat Certification

Individual issues relating to the amount of damages to be awarded to class members do not defeat certification. It is a long-established principle that differences among class members in the amounts of damages or restitution resulting from defendant's unlawful conduct do not bar class certification. (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1022, 1053; *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 742; *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 332.) This case is no different.

CACI 1820 sets forth the standard for the jury's determination of damages resulting from an invasion of privacy. A jury's award of damages for invasion of privacy must be "a reasonable amount based on the evidence and [] common sense." Although each class member may be affected in different ways by Sharp's unlawful conduct, because the award must be "reasonable" and tethered to the evidence, the variations in damages will not be as individualized as Sharp speculates. Much of the evidence supporting an award of damages will be focused on Sharp's conduct, and thus common to all class members.

With respect to individual evidence, Class members can easily be grouped according to the type of damages claimed through the use of a questionnaire. For example, class members can be asked to provide documentation of any economic damages, such as payment to therapists or doctors related to the invasion of privacy. The Court could establish subclasses based on the categories of damages claimed, the surgical procedure recorded, or the extent of exposure in the recording. The trial could be bifurcated, and Sharp's liability tried in the first phase. Following a finding of liability, the parties could conduct bellwether trials on the issue of damages, and stipulate to a baseline amount of damages. Pursuing any of

these options is consistent with the California Supreme Court's instruction to trial courts to use "innovative procedural tools" to effectively manage class actions and support the public policy encouraging use of the class action device. (*Sav-On Drug Stores, Inc.,* 34 Cal.4th at 339-40.)

Sharp does not address Plaintiff's multiple proposals for streamlining determination of damages. Sharp instead cites to inapt case law. A review of these cases demonstrates that this case presents straightforward issues, even with respect to damages, that can be easily managed.

In *Bennett v. Regents of Univ. of Cal.* (2005) 133 Cal.App.4th 347, plaintiffs alleged claims against UCLA based on how their relatives' remains were handled after they donated their bodies for medical research. (*Id.* at 351.) The appellate court affirmed denial of class certification because, after ***nine years*** of litigation, "plaintiffs failed to present any admissible evidence of their common 'core fact'" of improper disposal of their relative or loved ones' remains. (*Id.*) The court also held that the plaintiffs had not demonstrated that they could meet the elevated standard of proof for emotional distress in a lawsuit alleging improper treatment of human remains, which "can be difficult to prove." (*Id.* at 358.)

In *Brown v. Regents of Univ. of Cal.* (1984) 151 Cal.App.3d 982, the proposed class claims were based on allegations of intentional factual concealment and misrepresentation regarding the level of coronary care at a University of California hospital. (*Id.* at 985.) The court found that class treatment would not be appropriated because of a "veritable quagmire of tough factual questions which can only be resolved by individual proof." (*Id.* at 989.) These issues included, for each class member, their particular medical condition, the method of treatment, and proximate cause. (*Id.*) "All of the foregoing questions involve questions of what is medically appropriate for a particular patient under his particular circumstances." (*Id.*) There is no similar individualized inquiry as to liability here.

In *Rose v. Medtronics, Inc.* (1980) 107 Cal.App.3d 150, the plaintiff filed a class action complaint seeking damages for personal injuries caused by the defective manufacture of a cardiac pacemaker. (*Id.* at 153.) The court held that a class action could not be certified based on these claims because "defendant's liability could vary from claim to claim, claimants' damages could vary from nonexistent to damages for wrongful death, and the activities and skills of intermediaries … could have different degrees of relevancy for each claim." (*Id.* at 156-57.) This is a far cry from this case, where there are no individual issues as to liability, and the extent of damages could be determined efficiently through

subclasses .

D.C. v County of San Diego (S.D. Cal. Nov. 7, 2017) No. 15cv1868, 2017 U.S.Dist.LEXIS 185548, is a federal case that follows a different standard. In the Ninth Circuit, individualized damages assessments do not defeat certification as long as the damages can be "calculated using a mechanical or a formulaic process." (*Id.* at *46.) In California courts, in contrast, the Supreme Court has repeatedly confirmed that individual damages calculations do not defeat certification, and that trial courts should be procedurally innovative in handling the resolution of damages. (*E.g., Sav-On Drug Stores, Inc.*, 34 Cal.4th at 339-40.)

None of these cases is relevant to the Court's assessment of certification here. Unlike each of these cases, the overwhelming evidence to prove the class' claims will focus on Sharp's conduct, and individual issues of damages that can be managed efficiently do not defeat certification.

Sharp's reliance on the testimony of Dr. James O'Brien is similarly misplaced. Plaintiff has moved to strike Dr. O'Brien's declaration, with good cause. It does not meet the requirements set forth by the California Supreme Court in *Sargon Enters., Inc. v. Univ. of S. Cal.* (2012) 55 Cal.4th 747. Dr. O'Brien has no expertise that is relevant to this case. He has never treated or evaluated patients for invasion of privacy claims, or evaluated issues pertaining to invasion of privacy in a civil context. (Goddard Reply Decl. Ex. 28, at 54:8-10.) His opinions are based only speculation and conjecture, since he has never viewed or been made properly aware of the subject matter of the recordings at issue. (*Id.* at 17:5-10.) His opinion also lacks foundation, since it is based on inaccurate information regarding the facts of this case. (*Id.* at 8:17-18.)

Dr. O'Brien's testimony is not relevant to the issues in the case, and will only serve to confuse the trier of fact. His opinion assumes that the class members here will be required to prove their damages through expert testimony. But expert testimony is not required to prove damages arising from a personal injury. (*Capelouto v. Kaiser Foundation Hospital* (1972) 7 Cal. 3d 889, 895.) A plaintiff's testimony is sufficient to support a jury award. (*Id.*)

Dr. O'Brien's testimony should also be disregarded because he is nothing more than a bullhorn for attorney argument, simply amplifying counsel's positions without providing relevant expertise. (*Id.* at 20:20-24.) During his deposition, Dr. O'Brien repeatedly refused to answer relevant questions at the

direction of Sharp's counsel, including the incredible objection that verbal communications between Dr. O'Brien and Sharp's counsel are privileged attorney-client communications! (*Id.* at 7:12-9:11; 11:19-12:2; 23:7-15; 57:9-58:11.)

C. Class Treatment Is Superior

A court should not decline to certify a class "simply because it is afraid that insurmountable problems may appear at the remedy stage." (*Nicodemus,* 3 Cal.App.5th at 1214.) When considering whether a class action is superior, "[t]he relevant comparison lies between the costs and benefits of adjudicating plaintiffs' claims in a class action and the costs and benefits of proceeding by numerous separate actions – ***not*** between the complexity of a class suit that must accommodate some individualized inquiries and the absence of any remedial proceeding whatsoever." (*Id.* at 1219.) The California Supreme Court has instructed trial courts to use "innovative procedural tools" to effectively manage class actions and support California public policy, which "encourages the use of the class action device." (*Sav-On Drug Stores,* 34 Cal.4th at 339-40.) Trial courts are not required to determine at the certification stage precisely which tools they will use. (*Id.* at 340, fn. 12.)

Plaintiff has sufficiently demonstrated that common questions predominate, and this action is well-suited for certification. Plaintiff has also offered numerous "innovative procedural tools" to manage any individual damages issues that may arise, including bifurcation or bellwether trials, which Sharp simply ignores. Any individual issues can be easily managed here, particularly when comparing them to the extreme burden of litigating 1,806 cases on an individual basis.

The cases relied on by Sharp are inapposite. In *Newell,* the court found that a class action would not be superior for claims against a homeowners insurance company following the Northridge earthquake, because the individual plaintiffs had a strong interest in controlling their own cases, and several had pursued their own claims. (*Newell v. State Farm Gen. Ins. Co.* (2004) 118 Cal.App.4th 1094, 1104.) The opposite is true here. Sharp has never given notice to the class members of the secret recordings, so many class members have no idea that a recording exists, or existed, of one of the most private moments of their life. The only way to ensure that these patients are alerted to Sharp's unlawful conduct and their right to redress is through a class action, which will require notice to each class member. Also in *Newell*, the court found that a class action was not superior because there the class

members faced different types of wrongdoing, including "improper depreciation deductions, incorrect assessments of the earthquake damage to their home and lack of explanation regarding the denial or reduction of their claim." (*Id.*) In this case, the harm to the class members was caused by a single course of wrongful conduct: Sharp's installation and operation of hidden cameras in its operating rooms. The claims of class members here are substantially more cohesive, and class treatment is far superior to individual claims.

Sharp claims that the class is not manageable because it will result in "mini-trials" on damages, but the alternative the Court must consider is 1,806 full trials on liability and damages. (*Nicodemus*, 3 Cal.App.5th at 1219 ["[t]he relevant comparison lies between the costs and benefits of adjudicating plaintiffs' claims in a class action and the costs and benefits of proceeding by numerous separate actions – ***not*** between the complexity of a class suit that must accommodate some individualized inquiries and the absence of any remedial proceeding whatsoever."].) When compared to that alternative, even though procedural innovation might be required in the damages phase, a class action is far superior here.

///

///

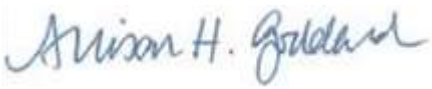
IV. CONCLUSION

Plaintiff's claims for invasion of privacy and breach of fiduciary duty meet all the requirements for class treatment under CCP § 382. Denying certification in this case would deny justice to a cohesive group of female patients whose right to privacy was invaded and abused by Sharp's wrongful conduct. Plaintiff respectfully requests that her Motion be granted.

Dated: March 2, 2018

ADMIRE & ASSOCIATES

PATTERSON LAW GROUP



By:_____

James R. Patterson, State Bar No. 211102
Allison H. Goddard, State Bar No. 211098
Jacquelyn E. Quinn, State Bar No. 314616
1350 Columbia Street, Suite 603
San Diego, CA 92101
Telephone: (619) 756-6990
Facsimile: (619) 756-6991

Attorneys for Plaintiff CARLA JONES